(22)

No. 99-1240

Supreme Court, U.S.
FILED
AUG 11 2000

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

—v.—

PATRICIA GARRETT and MILTON ASH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE VOICE OF THE RETARDED, ET AL., IN SUPPORT OF AFFIRMANCE*

WILLIAM J. BURKE
Counsel of Record
BURKE & STONE
370 Lexington Avenue
New York, New York 10017
(212) 697-6200

TAMIE HOPP
Voice of the Retarded
5005 Newport Drive
Rolling Meadows, Illinois 60008
(847) 253-6020

Attorneys for Amici Curiae

**Additional Amici listed in the brief*

Organizations in support

AMRA (formerly Association for the Mentally Retarded at Agnews) (CA)
Advocates for Human Development Center Residents (AR)
Advocates United (IL)
Allegheny Valley School (PA)
Alliance of Louisiana Schools for the Mentally Retarded
Altoona-Cresson-Ebensburg Centers' Association (PA)
Association for Hunterdon Developmental Center (NJ)
Association for Retarded Citizens of Missouri
Austin State School Parent Association (TX)
Beverly Farm Foundation (IL)
Bonneville Human Development Center Parent Association (AR)
California Association for the Retarded
California Association State Hospital and Parent Councils for the Retarded
Caswell Center Parents and Friends Association (NC)
Central State ICF/MR Bingham Center Family Group (KY)
Clover Bottom Developmental Center Parent-Guardian Association (TN)
Colorado Affiliates for the Developmentally Disabled (CO)
Common Thread (AR)
Concerned Families of Hazelwood Hospital (KY)
Conway Human Development Center Parents' Association (AR)
Denton State School Family Association (TX)
Developmental Disabilities Health Alliance, Inc. (NJ)
Dixon Association for Retarded Citizens (IL)
Exceptional Children's Foundation (CA)
Fairview Families and Friends (CA)

Families and Friends United for Central Virginia Training Center (VA)
Families United Incorporated (OH)
Fernald League for the Retarded (MA)
Florida's Voice of the Retarded
Fox Center Families and Friends (IL)
Friends and Families of the Black Mountain Center (NC)
Friends of Choate (IL)
Friends of Fircrest (WA)
Friends of Rainier, Inc. (WA)
Friends of Retarded Citizens of Connecticut
Friends of the Jacksonville Developmentally Disabled (IL)
Glenwood Parent/Family Group (IA)
Green Line Parent Group (CA)
Greentree Applied Systems, Inc. (KY)
Home and School Association of the Southbury Training School (CT)
Howe Association for Retarded Citizens (IL)
Idaho State School and Hospital Parent-Guardian Association
Illinois League of Advocates for the Developmentally Disabled
Kankakee Association for the Mentally Retarded (IL)
Lakeland Village Associates (WA)
Lincoln Parents' Association (IL)
Lubbock State School Parent Association (TX)
Maine Parents and Friends Association, Inc.
Maryland Parents Association of Disabled Citizens
Massachusetts Coalition of Families and Advocates for the Retarded, Inc.
Meadows Parents Association (IL)
Mental Retardation Association of Nebraska
Mental Retardation Association of North Carolina, Inc.
Mental Retardation Association of Utah
Mexia State School Parents Association (TX)

Misericordia Family Association (IL)
Murray Parents Association (IL)
National Alliance Of The DisAbled
New Lisbon Developmental Center Family and Friends Association (NJ)
North Jersey Developmental Center Parents Council (NJ)
Northern Wisconsin Center Parents Group
Ohio League for the Mentally Retarded
Ohio MRDD Parents Speak
Oregon Voice of the Retarded
Parent Association for the Retarded of Texas, Inc.
Parents and Associates of the Institutionalized Retarded of Virginia
Parents and Associates of Northern Virginia Training Center
Parents and Friends of Hammond Developmental Center Association (LA)
Parents and Friends of Ludeman Center (IL)
Parents and Friends Volunteer Association (OH)
Parents Association of Northwest Louisiana Developmental Center
Parents Coordinating Council and Friends (CA)
Parents of Adult Children Concerned for Tomorrow (IL)
Parents of Woodhaven, Inc. (PA)
Parent-Relative Organization for Oakwood Facilities, Inc. (KY)
Parents, Relatives and Friends of Polk (PA)
Patrons of Partlow (AL)
Porterville Developmental Center Parents Group, Inc. (CA)
Richmond State School Parents Association (TX)
Rosewood Center Auxiliary, Inc. (MD)
Save Agnews Now (CA)
Sonoma Development Center Parent Hospital Association

South Mississippi Regional Center Parents' Association
Southern Wisconsin Center Parent Committee
Southwest Developmental Center Parents Association (LA)
Taxpayers and Taxpaying Clients United (CA)
Tennessee Family Solutions
Valley Association for Retarded Children and Adults (CT)
Waukegan Developmental Center Association for Retarded Citizens (IL)
Wendell Foster Center, Inc. (KY)
Wisconsin Parents Coalition for the Retarded, Inc.
Woodbridge Development Center Parents Association (NJ)
Wrentham Association for the Retarded (MA)

TABLE OF CONTENTS

	PAGE
List of Amici	i
Table of Contents	v
Table of Authorities	vi
Preliminary Statement	1
Interest of the VOR Amici	1
Summary of Argument	3
Argument:	
I. THE ORIGINAL INTENT AND COVERAGE OF THE FOURTEENTH AMENDMENT:	
A. AUTHORIZES THE ADA, AND	3
B. REPEALS ELEVENTH AMENDMENT SOVEREIGN IMMUNITY FOR STATE ACTION WITHIN ADA COVERAGE	6
C. Summary	7
Conclusion	8

TABLE OF AUTHORITIES

Cases PAGE

Barron v. *Mayor and Council of Baltimore*, 7 Peters 243 (1833) 6

City of Boerne v. *Flores*, 521 US 507 (1997) 4, 6 n.10, 7

City of Newport v. *Fact Concepts, Inc.*, 453 US 247 (1981) 4

Fitzpatrick v. *Bitzer*, 427 US 445 (1976) 6

Florida Prepaid Postsecondary Expense Board v. *College Savings Bank*, 527 US 627; 119 S. Ct. 2199; 144 L. Ed. 2d 636 (1999).. 6

Heller v. *Doe*, 509 US 312 (1993) 1

Kimel v. *Florida Board of Regents*, ___ US ___; 120 S. Ct. 631; ___ L. Ed. 2d ___ (Jan. 11, 2000) 3

Olmstead v. *L.C.*, 527 US ___; 119 S. Ct. 2176; 144 L. Ed. 2d 540 (1999) 1, 2

Parent-Guardian Association of Arlington Developmental Center v. *People First of Tennessee*, 145 F. 3d 1332 (6 Cir. 1998), *cert. denied*, 119 S. Ct. 510 (1998) 2

Richard C. v. *Snider*, No. 99-3841 (3 Cir.; July 25, 2000) 2 n.4

Constitutional Amendments

XI 3, 4, n.5, 6, 7

XIII, § 2 ..... 4 n.6

PAGE

XIV, § 1 ..... 6, 6 nn.9-10, 7

XIV, § 2 5

XIV, § 3 5

XIV, § 4 5

XIV, § 5 ..... 3, 4

XV, § 2 ..... 4 n.6

XVIII, § 2 ..... 4 n.6

XIX, § 2 ..... 4 n.6

XXIII, § 2 ..... 4 n.6

XXIV, § 2 ..... 4 n.6

XXVI, § 2 ..... 4 n.6

Statutes and Rules

42 USC § 6000(c)(3) 2

42 USC § 12101 *et seq.* 1

USSC Rule 37.6 ..... 1 n.1

Other

Charles & Mary Beard, *The Rise of American Civilization* (MacMillan, 1933) 5 n.7, 6 n.9

Eric Foner, *A Short History of Reconstruction* (Harper & Row, 1990) 5 n.8

Harper's Weekly, Aug. 5, 1865 ..... 5 n.8, App. 1a

Hon. Donna Shalala letter to all U.S. Governors, 14 January 2000 ..... 2 n.4

Preliminary Statement

This is an *amicus curiae* brief on the merits submitted, on consent, by Voice of the Retarded ("VOR")[1] in support of the Americans With Disabilities Act, 42 USC §§ 12101 *et seq.* ("ADA"). 93 *amici*, disability rights organizations, join in this brief.[2]

Interest of the VOR Amici

A frequent critic of how the ADA is applied, VOR and its *amici* nevertheless defend the constitutionality of the statute here. We offer a unique perspective in this brief.

VOR is an advocacy organization incorporated in Illinois, dedicated to insuring that individuals with mental retardation receive the care and support they require in a setting appropriate to their needs. Depending on the unique condition of each person, that appropriate setting could be community placement or institutional treatment. A spectrum of choices must be available.

VOR most recently offered its views to this Court, on behalf of 142 *amici*, in *Olmstead* v. *L.C.*, 527 US ___; 119 S. Ct. 2176; 144 L. Ed. 2d 540 (1999), arguing that the ADA contemplated institutional care as the most integrated setting for some people with mental retardation. The Court accepted and quoted VOR's position in its opinion. (527 US at ___; 144 L. Ed. 2d at 561; 119 S. Ct. at 2189.)

VOR has also filed an *amicus* brief here in *Heller* v. *Doe*, 509 US 312 (1993), and a petition for *certiorari* in

---

[1] Pursuant to this Court's Rule 37.6, VOR represents that no counsel to any party authored this brief, in whole or in part. VOR has paid disbursements and its counsel's fee.

[2] Their names begin at p. i, *supra*.

Parent-Guardian Association of Arlington Developmental Center v. *People First of Tennessee*, *cert. denied*, 119 S. Ct. 510 (1998)[3], arguing in each case for the primacy of the decisions of the person with disabilities and her family. This position was enacted as a statement of policy in the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994, 42 USC § 6000(c)(3).

From VOR's perspective, the ADA means well, but has been interpreted badly whenever wielded as a sword to dismantle the institutional option.[4] The proper application of the statute was well illustrated by a question from the bench during the *Olmstead* oral argument:

> ". . . I'm also concerned about the possibility that if we adopt the [integration] rule in its strongest form . . . the States, in order to avoid the risk of liability, would have a motive and incentive to push people out into the community [who] should not go in that direction. . .". (Oral argument tr. at p. 38; see, also, 527 US at ___; 144 L. Ed. 2d at 563-4; 119 S. Ct. at 2191-2; Kennedy, J., concurring.)

---

[3] Opinion below, 145 F. 3d 1332 (6 Cir. 1998).

[4] In VOR's view, *Olmstead* is properly interpreted to provide community placement when, on the facts of each case, such placement is medically appropriate; is endorsed by the disabled person, or her proper representative, and can be reasonably accommodated. VOR also argues that the converse is true: when, on the facts of each case, institutional placement is found to be medically appropriate; is endorsed by the disabled person, or her proper representative, and can be reasonably accommodated. To our surprise, this "converse" proposition has been strenuously resisted. See, *e.g.*, *Richard C.* v. *Snider*, No. 99-3841, slip op, pp. 8-9 (3 Cir.; July 25, 2000, directed to be unreported; *dictum*), and letter of Hon. Donna E. Shalala, Secretary of the Department of Health and Human Services, to all U.S. Governors, dated 14 January 2000, and enclosures directed to each state's "Medicaid Director".

VOR urges this Court to sustain the constitutionality of a good and helpful statute, and to reiterate that institutional placement, in a factually proper case, remains an option and a right.

Summary of Argument

In this submission, we remind the Court that federal protection of people with disabilities against state action began 135 years ago, as part of the Fourteenth Amendment process.

To the extent the intent of the framers of the Fourteenth Amendment is pertinent to authorization of the ADA under Amdt. XIV, § 5, protection of people with disabilities was included (*A*, below), and state sovereign immunity under the Eleventh Amendment was repealed (*B*, below).

We also fully support the views of respondents and other *amici* that the ADA is a congruent and proportional remedy for the evil of invidious discrimination.

ARGUMENT

I. THE ORIGINAL INTENT AND COVERAGE OF THE FOURTEENTH AMENDMENT:

A. AUTHORIZES THE ADA, AND

B. REPEALS ELEVENTH AMENDMENT SOVEREIGN IMMUNITY FOR STATE ACTION WITHIN ADA COVERAGE.

A 5-4 majority of this Court has recently cautioned against "a substantive redefinition of the Fourteenth Amendment right at issue". *Kimel* v. *Florida Board of Regents*, ___ US ___, at ___; 120 S. Ct. 631, at 644;

___ L. Ed. 2d. ___, at ___ (Jan. 11, 2000). As Justice Kennedy put it for the Court in *City of Boerne* v. *Flores*, 521 US 507 (1997):

> "Congress does not enforce a constitutional right by changing what the right is." (521 US at 519.)

In this submission, VOR examines "what the right is" by revisiting the original concept of the framers of the Fourteenth Amendment.[5] See *City of Boerne*, *supra*, 521 US at 525; *City of Newport* v. *Fact Concepts, Inc.*, 453 US 247, at 263-4 (1981).

A. Original Intent: Disability Coverage

The Fourteenth Amendment was one of three addressing post-Civil War remedies. Two were "single-issue" amendments: the Thirteenth, abolishing slavery, and the Fifteenth, creating voting rights. A broader sweep was given to the Fourteenth, with multiple issues presented in the four-section substantive text; the standard enabling clause became its fifth. (Amdt. XIV, § 5.).[6]

The scope of the problem addressed by the three amendments encompassed wounded Union Army survivors. Included in "gross [casualty] totals that staggered the mind" was:

---

[5] The Court need not reach this issue if it concludes, as VOR does, that the ADA satisfies this Court's tests of specific legislative intent to waive Eleventh Amendment immunity, and the "congruence and proportionality" of the ADA remedy.

[6] In the other two post-Civil War amendments, the legislative enabling clause was § 2. (Amdt. XIII, § 2; Amdt. XV, § 2.) So it has been five times since, for prohibition (Amdt. XVIII, § 2); voting by gender (Amdt. XIX, § 2); District of Columbia electors (Amdt. XXIII, § 2); elimination of the poll tax (Amdt. XXIV, § 2), and voting by age (Amdt. XXVI, § 2).

"the list of [Union] wounded who recovered, two hundred and seventy-five thousand more."[7]

A Thomas Nast cartoon captured the spirit of the three amendments: a uniformed Union black veteran, freed from slavery, appears at the polling place as the figure of Liberty asks, "And Not This Man?"[8] (App. 1a.) Notably, the solider's right leg is amputated.

While case law has properly focused on the sweeping general provisions of the first clause of the Fourteenth Amendment, the balance of the substantive clauses reflect the national concerns of the time: loss of representation upon resistance to emancipation or denial of voting rights (Amdt. XIV, § 2); denial of federal office to certain former Confederates (Amdt. XIV, § 3); illegality of assumption of Confederate debts (Amdt. XIV,§ 4, second sentence), and elimination of a claim for loss or emancipation of a slave (*ibid.*). Expressly included was a clause protecting pensions of Union Civil War veterans. (Amdt. XIV, § 4, first sentence.)

VOR respectfully submits that this reading of the full Fourteenth Amendment, in view of the crucible through which the nation had just passed, would include a rudimentary protection of disabled soldiers, and a concern for their nondiscriminatory treatment. The Fourteenth Amendment enabled a great range of legislation for a great many legislative objects. These 1865 goals are perfectly consistent with the ADA, and would include that

---

[7] Charles and Mary Beard, *The Rise of American Civilization* (MacMillan, 1933), II, p. 99. Accurate Confederate records of their wounded were unavailable. *Ibid.*

[8] Harper's Weekly, Aug. 5, 1865, as reproduced in Eric Foner, *A Short History of Reconstruction* (Harper & Row, 1990), facing p. 145.

statute within the legislation authorized by Amdt. XIV, § 5.

B. Original Intent: Repeal of Eleventh Amendment Sovereign Immunity

An inquiry into the enactment of the Fourteenth Amendment revisits the painful history of Reconstruction, and the fascinating historical record created by the joint Senate-House "Committee of Fifteen".

We outline one portion of this record: the expressed intent of the drafters of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity, in order to effectuate the goals of Congressional Reconstruction.

Representative John A. Bingham (R-Ohio) drafted the broad protections involved in this litigation (Amdt. XIV, § 1). He later advised Congress that his intent was to reverse the result of *Barron* v. *Mayor and Council of Baltimore*, 7 Peters 243 (1833), which held that the Bill of Rights offered no protection against confiscation by a state or its subdivisions. "Word for word and syllable for syllable", Rep. Bingham copied Fifth Amendment protections against the national government into the final draft of the proposed Fourteenth. The goal was to create state responsibility by removing Eleventh Amendment immunity[9]—a view endorsed by this Court in, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 US 445 (1976), and *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 US 627, at ___; 119 S. Ct. 2199, at 2205-6; 144 L. Ed. 2d 636, at ___ (1999).[10]

---

[9] Charles and Mary Beard, *supra*, pp. 111-3, *passim*. The pertinent portions of Amdt. XIV, § 1, read "No State shall. . .."; "nor shall any State deprive . . . nor deny. . .".

[10] For the earlier drafting history of the Fourteenth Amendment, see Point III(A)(1) of this Court's opinion in *City of Boerne* v. *Flores*, *supra*, 521 US at 520-3.

C. Summary

Whatever this Court's result may be, it should not violate the historical record of the concerns prompting enactment of the Fourteenth Amendment.

Over a quarter million wounded Union troops were included in the post-war remedy, a factor which enfolds disability within the scope of the Fourteenth Amendment. (*A*, above.) Repeal of state sovereign immunity, to the extent necessary for the effectiveness of the Fourteenth Amendment, was clearly intended. (*B*, above.)

As we understand *City of Boerne*, *supra*, and its progeny, a showing of nineteenth-century intent to include people with disabilities within the scope of the Fourteenth Amendment, and to repeal Eleventh Amendment immunity to the extent necessary for the Civil War Amendments, will support the constitutionality of the ADA. From VOR's unique perspective as an advocate for some of today's most severely disabled people, we are pleased to offer the Court our views as an alternate or additional ground for affirmance.

Conclusion

For the reasons advanced above; in the other *amici* submissions in favor of respondents, and in respondents' own submissions, VOR and its *amici* submit that the Court of Appeals should be affirmed.

Dated: New York, New York
August 10, 2000

Respectfully submitted,

WILLIAM J. BURKE, ESQ.
Counsel of Record
Amici curiae Voice of the Retarded, *et al.*
BURKE & STONE
370 Lexington Avenue
New York, New York 10017
(212) 697-6200

Of counsel: TAMIE HOPP, ESQ.
Voice of the Retarded
5005 Newport Drive
Rolling Meadows, Illinois 60008
(847) 253-6020

APPENDIX

INDEX TO APPENDIX

PAGE

A. Harper's Weekly cartoon, dated 5 August 1865 ..... 1a

RETREAT FROM RECONSTRUCTION

"And Not This Man?" (*Harper's Weekly*, August 5, 1865)

BEST AVAILABLE COPY